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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MARYLAND,

Petitioner,

—v.—

SANDRA ANN CRAIG,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF *AMICUS CURIAE* FOR THE DISTRICT ATTORNEY OF KINGS COUNTY, NEW YORK, THE DISTRICT ATTORNEY OF BRONX COUNTY, NEW YORK, AND THE NEW YORK STATE DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Confrontation Clause permits a child victim of sexual abuse to testify and be fully cross-examined outside the defendant's presence via closed-circuit television, after an appropriate case-specific finding has been made that such a procedure will protect the child from suffering serious psychological harm, without first requiring the child to suffer that harm by testifying in the defendant's presence.

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AUTHORITY TO FILE BRIEF AMICUS CURIAE

Charles J. Hynes, District Attorney of Kings County, New York, and Robert T. Johnson, District Attorney of Bronx County, New York, have authority to file the attached brief *amicus curiae* pursuant to Rule 37.5, because each is the authorized law officer of a political subdivision of a state.

Charles J. Hynes and Robert T. Johnson, together with The New York State District Attorneys Association, also file this brief with consent of the attorneys for the petitioner and respondent, pursuant to Rule 37.3. Letters of consent from the attorneys for the parties have been mailed under separate cover to the clerk of this Court.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

1. Charles J. Hynes is the District Attorney of Kings County, New York. The District Attorney's Office prosecutes sex crime cases in Kings County, including those involving child victims. Over the years this office has prosecuted thousands of such cases. The office has also had to decline to prosecute a significant number of such cases because the child victims in those cases were unable to endure the psychological trauma caused by testifying using traditional testimonial procedures.

To address this problem, the Kings County District Attorney's Office, together with the New York State Attorney General's Office, drafted legislation to enable child sex crime victims in New York State to testify at trial via two-way closed-circuit television. This legislation was enacted in 1985 as Chapter 505 of the Laws of 1985 and became Article 65 of the New York Criminal Procedure Law, appended to this brief. The law was originally passed as a three-year experiment. In 1988, the law was extended for an additional three-year period. According to statistics compiled by the Chief Administrative Judge of the Courts of New York, the procedures authorized by this law have been used approximately thirty times since its enactment. *1987-1989 Reports to the Governor, the Chief Judge, and the Legislature of the State of New York Pursuant to New York Judiciary Law Section 216 (4) Concerning the Use of Closed-Circuit Television for Vulnerable Child Witness's Testimony*. The constitutionality of that law was recently upheld by the New York State Court of Appeals in *People v. Cintron*, No. 241 (N.Y. Ct. App. January 11, 1990) (available on Westlaw, 1990 W.L. 1337).

Because of the inherent difficulties in prosecuting child abusers, and the rising number of child sex abuse cases, *amicus* has a strong interest in using modern technology to minimize the trauma that child victims experience during trial testimony. By sparing children a "second victimization" in the courtroom, the criminal justice system can encourage such victims to report crimes committed against them, and prosecutors can obtain their testimony for trial and can proceed with warranted criminal prosecutions against child molesters.

2. Robert T. Johnson is the District Attorney of Bronx County. The Bronx County District Attorney's Office prosecutes child sex crimes which occur in Bronx County and has also had to decline prosecutions of child sex crimes because some child victims were too traumatized to testify at trial using traditional testimonial procedures. Since the enactment of New York Criminal Procedure Law Article 65, *amicus* has proceeded pursuant to that statute on a number of occasions

and has found it to be an effective means of sparing the child victim from serious psychological harm.

The Bronx County District Attorney recently successfully defended the constitutionality of New York's closed-circuit television statute in the New York State Court of Appeals. *See People v. Cintron*, *supra*. Like his counterpart in Kings County, the Bronx County District Attorney has a strong interest in seeing the constitutionality of closed-circuit television procedures upheld so that sex offenders who prey on young children can be brought to justice.

3. The New York State District Attorneys Association is a voluntary organization representing local prosecutors from each of the 62 counties in New York State. The prosecutors in each of these counties prosecute child sex offenses occurring within their jurisdiction. Since its founding in 1948, the Association's programs of education, training, legislative reform and *amicus curiae* activity further one of its chief goals, that of improving the functioning of the criminal justice system.

INTRODUCTION AND SUMMARY OF ARGUMENT

In response to the problems that are inherent in child molestation cases, a number of states have adopted statutes that permit the use of testimony via two-way closed-circuit television in lieu of traditional in-court testimony. These two-way systems fundamentally differ from the system in *Coy* and in the case at bar. They permit the testifying witness and defendant to hear and view one another, thereby satisfying the letter and spirit of the Confrontation Clause. In *Coy*, Justice O'Connor suggested that these two-way systems "may raise no substantial Confrontation Clause problem." *Coy v. Iowa*, 108 S. Ct. 2798, 2804 (1988) (O'Connor, J., concurring). Justice O'Connor was correct. These systems do not implicate, much less offend, the Confrontation Clause. Unfortunately, the courts of several states have considered these systems to be equivalent, for Confrontation Clause purposes, to the one-way screen employed in *Coy*, and, consequently, have incorrectly ruled that the Constitution

mandates a hearing as a condition precedent to the use of two-way systems that simultaneously transmit a child's testimony to the courtroom. This Court should use the opportunity presented by this case to make it clear that two-way closed-circuit television systems are a constitutional alternative to traditional in-court testimony in child sexual abuse cases.

Should this Court determine that the Confrontation Clause is implicated whenever a child testifies via closed-circuit television about alleged sexual abuse, the state's compelling interest in protecting child witnesses outweighs the need for strict compliance with the Confrontation Clause. This is so whether the closed-circuit television is a one-way system such as the one at issue here or a two-way system as is used in New York. Indeed, because the latter system implicates the Confrontation Clause only marginally, the state's overriding need for this alternative to traditional in-court testimony in these cases is even more clearly established. As this Court recognized in *Coy*, "rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests." *Coy v. Iowa*, 108 S. Ct. at 2802. *See Ohio v. Roberts*, 448 U.S. 63, 64 (1980) ("competing interests, if 'closely examined,' may warrant dispensing with confrontation at trial") (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 [1973]). Because the use of closed-circuit television is often the only way to elicit a child's testimony and attempt a successful prosecution of the child's alleged abuser, without severe harm to the child, there is a compelling need for an exception to strict compliance with the Confrontation Clause to allow such evidence at a state trial.

Strict compliance with the Confrontation Clause is not required if the two-part test established in *Ohio v. Roberts*, 448 U.S. at 65-66, is satisfied. *See, e.g., Nelson v. Farrey*, 874 F.2d 1222, 1230-34 (7th Cir. 1989) (Flaum, J., concurring), *U.S. app. pending* (applying *Ohio v. Roberts* test to case concerning admission of psychologist's testimony about statements made by four-year-old victim of first-degree sexual assault in Wisconsin). First, there must be a case-specific finding of a need for the particular statements of a witness,

where admission of the statements does not provide the defendant with face-to-face confrontation regarding that evidence. *Ohio v. Roberts*, 448 U.S. at 65. Second, there must be indications that the evidence sought to be admitted is reliable. *Id.* at 65-66. Where the prosecution seeks to allow a victim of child abuse to testify via closed-circuit television, either a need to protect the child from suffering harm or a need for the child's testimony should satisfy the necessity requirement. While the child's testimony in and of itself may not necessarily bear indications of inherent reliability (as is the case with dying declarations or excited utterances, for example), so long as the procedure employed to gain the child's testimony allows the fact-finder a sufficient opportunity to assess the reliability of the testimony, the reliability requirement is satisfied. Therefore, when these requirements are met in a particular case, this Court should allow the state prosecutor to use closed-circuit television, which is simultaneously transmitted to the courtroom where the trial is being conducted, to present the child's testimony.

Moreover, the Confrontation Clause does not dictate the exact manner by which such a case-specific finding may be made. And, even if it did, this Court should find that the Constitution does not require a child to testify in the presence of the defendant as a condition to the admission of testimony via closed-circuit television. Indeed, any such requirement would lead to absurd results. For example, in New York, the statute regarding testimony via two-way closed-circuit television designates as a prerequisite for the use of such a procedure a finding that the child witness is likely to suffer "severe mental or emotional harm" if required to testify in open court in front of the defendant (N.Y. Crim. Proc. Law § 65.10 [1] [McKinney Supp. 1990]). It would make no sense, and indeed would be intolerable, if the state were allowed to use the child protective measures of a closed-circuit television statute only after the abused child was compelled to testify in the defendant's presence and thereby suffer the very harm the statute seeks to prevent. The Confrontation Clause surely cannot require such an absurd result.

The Court of Appeals of Maryland, however, apparently believed, erroneously, that the Confrontation Clause does require such an intolerable procedure before a child abuse victim could be permitted to testify via closed-circuit television. Therefore, this case should be remanded to that court to determine whether it would find this procedure unnecessary in light of the fact that the Confrontation Clause does not require it.

ARGUMENT

ALLOWING A CHILD VICTIM OF SEXUAL ABUSE TO TESTIFY VIA TWO-WAY CLOSED-CIRCUIT TELEVISION DOES NOT IMPLICATE THE CONFRONTATION CLAUSE. IN ANY EVENT, THE CONSTITUTION DOES NOT REQUIRE, AS A CONDITION PRECEDENT TO THE ADMISSION OF AN ABUSED CHILD'S TESTIMONY VIA CLOSED-CIRCUIT TELEVISION, THAT THE CHILD TESTIFY AT A PRETRIAL HEARING IN THE DEFENDANT'S PRESENCE, IF SUCH A PROCEDURE WILL CAUSE THE CHILD TO SUFFER SEVERE EMOTIONAL HARM.

A. Testimony via two-way closed-circuit television does not implicate the Confrontation Clause.

Initially, *amicus* asks the Court to be mindful of the fact that New York and a number of other states employ a system of two-way closed-circuit television that is fundamentally different from the method being considered in the case at bar.[1] These systems are unique in that they afford the testifying witness and the defendant the opportunity simultaneously to hear and view one another and, consequently, fully protect a defendant's right to confrontation. Accordingly, it is unnec-

1 *See, e.g.*, Cal. Penal Code § 1347 (West Supp. 1989); Haw. R. Evid. 616 (1989); Md. Cts. & Jud. Proc. Code Ann. § 9-102 (1989 Repl. Vol.); Minn. Stat. Ann. § 595.02 (4) (c) (2) (West Supp. 1989); N.Y. Crim. Proc. Law Art. 65 (McKinney Supp. 1990); Vt. R. Evid. 807 (1989); Va. Code § 18.2-67.9 (1989).

essary for a trial court to make the individualized factual findings of an important state interest normally required when there is a substantive abridgement of a defendant's right to face-to-face confrontation. Nevertheless, although nothing in this Court's ruling in *Coy* suggests a contrary conclusion, the courts of several states have unfortunately misinterpreted *Coy* as mandating such individual findings of fact prior to the use of two-way closed-circuit television systems.[2] These decisions are wrong, and this Court should now take this opportunity to state unambiguously that two-way closed-circuit television systems do not implicate, much less offend, the Confrontation Clause.

Under New York Criminal Procedure Law Article 65, a trial court may utilize a system of live cameras and monitors once it determines that a child will suffer severe mental or emotional harm if required to testify and numerous other conditions are met.[3] If the system is used, the image and voice of the child, who is placed in a separate testimonial room, are transmitted to a closed-circuit television monitor in the courtroom. N.Y. Crim. Proc. Law § 65.30(1). At the same time, the child witness has the opportunity to observe the defendant and jury on a live, closed-circuit television monitor located in the testimonial room. N.Y. Crim. Proc.

2 *See, e.g., State v. Conklin*, 444 N.W.2d 268, 270-71 (Minn. 1989), *reh'g denied* (October 18, 1989) (Minn. LEXIS 262) (individual findings of fact required before use of two-way television systems); *People v. Cintron*, No. 241 (N.Y. Ct. App. January 11, 1990) (available on Westlaw, 1990 W.L. 1337) (same); *People v. Jones*, 209 Cal. App.3d 89, 257 Cal. Rptr. 342 (Cal. Ct. App., 4th Dist. 1989), *review granted* (June 29, 1989) (two-way closed-circuit television systems are to be treated as exception to Confrontation Clause).

3 Specifically, before permitting testimony via two-way closed-circuit television, the court must make a finding, by clear and convincing evidence, that "it is likely, as a result of extraordinary circumstances, that such child will suffer severe mental or emotional harm if required to testify at a criminal proceeding without the use of live, two-way closed-circuit television and that the use of such live, two-way closed-circuit television will help prevent, or diminish the likelihood or extent of, such harm." N.Y. Crim. Proc. Law § 65.10 (1). The full text of the statute, including the numerous factors the court may consider in making this finding, is appended to this brief for the Court's convenience.

Law § 65.30(2). In all other respects, the examination and cross-examination must be conducted as if the child were testifying in the courtroom. N.Y. Crim. Proc. Law § 65.30(7).

The New York Court of Appeals has held that this procedure does not facially offend the Confrontation Clause. However, the Court of Appeals predicated its decision on the limited rationale that "a statute which tolerates some infringement of the witness-jury confrontation right can meet constitutional requirements provided it contains sufficient limitations and safeguards." *People v. Cintron*, slip op. at 12. A number of other state courts have also concluded, based on their misreading of *Coy*, that two-way closed-circuit television systems are equivalent, for confrontation purposes, to the system employed in *Coy*. However, as Justice O'Connor noted in *Coy v. Iowa*, 108 S. Ct. at 2804 (O'Connor, J. concurring), testimony via two-way closed-circuit television systems "may raise no substantial Confrontation Clause problems."

Two-way closed-circuit television systems are significantly different from the system employed in *Coy* and in the case at bar. Essentially, a two-way system transforms the concrete wall separating the courtroom and the testimonial room into a transparent pane of glass. Each individual in the courtroom and testimonial room can see and hear one another. Thus, there is no meaningful difference between testimony taken by this method and traditional in-court testimony. In both cases, the defendant can see the witness, the witness can see the defendant, there is full cross-examination and the jury has the opportunity to observe the witness's live, spontaneous reactions during direct and cross-examinations.

The only difference between testimony via two-way closed-circuit television and traditional in-court testimony is that the former reduces or eliminates the risk that a child will suffer severe emotional harm or be unable to testify as a result of the fear-inducing trauma caused when the child testifies

within feet of the defendant.[4] The reduction or elimination of this trauma does not implicate the Confrontation Clause, because that constitutional provision does not guarantee to a defendant a right to instill fear of physical harm in the witness. Indeed, the fear of physical retribution by the defendant, be it real or imagined, has never been viewed as a component of the truth-instilling role of the Confrontation Clause. *Cf. Reynolds v. United States*, 98 U.S. 145, 158 (1878) (the right to confrontation does not exist when the defendant voluntarily keeps the witness from testifying).

This Court's decision in *Coy* does not suggest a contrary conclusion. In *Coy*, the Court noted that the right to face-to-face confrontation[5] arose from the historic belief that a witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts." *Coy v. Iowa*, 108 S. Ct. at 2802 (quoting Z. Chafee, *The Blessings of Liberty*, 35 [1956]). By using the term "human feelings," the Court merely recognized the well-settled principle that the purpose of face-to-face confrontation is to produce "a certain subjective moral effect . . . upon the witness." *Id.* at 2801 n. 2

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4 The physical separation of a child witness from the defendant does not stigmatize a defendant so that his right to a fair trial is compromised. "Reason, principle and common human experience" do not dictate that these procedures necessarily give rise to an unmistakable brand of guilt, creating an unacceptable risk, incurable by cautionary instructions, that the jury will depart from its role as an impartial finder of fact. *Estelle v. Williams*, 425 U.S. 501, 504, *reh'g denied*, 426 U.S. 954 (1976). More than likely, the jury will accept the fact that, in this particular instance, the law, not the actions of the defendant, prompted the use of the testimony via two-way closed-circuit television systems. Indeed, the New York statutory scheme provides that, if at all possible, the prosecutor and defense lawyer should conduct their examination of the child from the courtroom, thereby minimizing the possibility that an adverse inference will be taken. N.Y. Crim. Proc. Law § 65.30 (5).

5 Undoubtedly, the historic use of the term "face-to-face" reflects the fact that it was impossible to envision the technology that now facilitates confrontation of witnesses without a concomitant need to be in the same room. *See* Note, *The Testimony of Chiid Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 Harv. L. Rev. 806, 823, n. 108 (1985).

(referring to J. Wigmore, Evidence § 1395, p. 153 [Chadbourne, rev. 1974]). The Court did not hold that a witness has to become terrified or psychologically traumatized in order to satisfy a defendant's right to confrontation. Rather, the Sixth Amendment is satisfied when the confrontation is sufficient to stir the witness's conscience by virtue of the knowledge that the witness's accusations will have serious consequences for the accused—the person who is watching the testimony. *See Mattox v. United States*, 156 U.S. 237, 242 (1895) (confrontation has the effect of "sifting the conscience of the witness"). Because two-way closed-circuit television is capable of producing the requisite subjective effect upon a witness's conscience, a defendant's Confrontation Clause rights are fully protected.

The core purpose of the Confrontation Clause is to ensure that testimony offered against a defendant be truthful. *United States v. Inadi*, 475 U.S. 387, 398 (1986). Testimony provided via two-way closed-circuit television advances that core purpose. It would be a perversion of the Confrontation Clause to allow only traditional in-court testimony, and thereby prevent many child abuse victims from having their complaints heard under conditions bearing sufficient indicia of reliability.

The Court forewarned in *Mattox* that "[a] technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant." *Mattox v. United States*, 156 U.S. at 243. The use of testimony via two-way closed-circuit television systems satisfies the letter and spirit of the Confrontation Clause.

B. There is a compelling state interest in protecting child victims of sexual abuse.

Child abuse is an ever-growing problem that is devastating this country. This is evidenced by the fact that, "[f]rom 1976 to 1985, annual reports of child maltreatment made to designated public agencies increased dramatically, leaping nearly threefold from 669,000 reports to over 1.9 million. Reports

of child sexual abuse have risen at an even more alarming rate. By 1985, 12 percent of all reported child maltreatment involved sexual abuse allegations." *Amicus Curiae* Brief of American Bar Association at 8, *Coy v. Iowa*, 108 S. Ct. 2798 (1988) (citing American Association for Protecting Children, *Highlights of Official Child Neglect and Abuse Reporting 1985*, at 3, 16 [1987]). By 1988, annual reports of child maltreatment had grown to 2.2 million with reports of child sexual abuse accounting for up to 16% of the total or 374,000 child sexual abuse reports. *See* Daro and Mitchell, *Child Abuse Fatalities Continue to Rise: The Results of the 1988 Annual Fifty State Survey*, National Committee for the Prevention of Child Abuse (1989). Moreover, it has been estimated that the number of unreported cases of child sexual abuse is more than triple the number of reported cases. *See Criminal Procedure—Presumed Guilty: The Use of Videotaped and Closed-Circuit Televised Testimony in Child Sex Abuse Prosecutions and the Defendant's Right to Confrontation—Coy v. Iowa*, 11 Campbell L. Rev. 381, at 381 (1989).

Child abuse is an especially pervasive problem in New York, and one that has grown significantly in recent years. The New York State Department of Social Services received more than 104,000 reports of child abuse and neglect in 1987. New York State Department of Social Services, *New York State Child Abuse and Maltreatment Register Report Number 410*, at 70 (January 2, 1988). This figure increased to more than 130,000 reports in 1989. *Id.* at 70 (January 7, 1990). In New York City alone, reports of child abuse and neglect increased from approximately 41,000 in 1986 to 59,353 reports in 1989. *The Mayor's Management Report* (City of New York, September 17, 1989).

In addition, because the majority of child abusers were themselves sexually abused as children, unrestricted incidents of child sexual abuse lead to an "intergenerational cycling" of learned abusive behavior. *Child Sexual Abuse*, pp. 19-20 (M. McCabe, R. Cohen, V. Weiss eds. 1985). Studies have shown that sexual victimization of children has had profoundly harmful effects on both children and society. Abused

children often develop related problems of drug abuse, juvenile delinquency, juvenile prostitution, adult clinical depression, and similar difficulties. Rogers, *Child Sexual Abuse and the Courts: Preliminary Findings, reprinted in Oversight Hearings to Consider the Testimony of Children in Sexual Abuse Cases Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary*, 98th Cong., 2nd Sess. 184 (May 2 and 22, 1984) (studies omitted). Also, child sex offenders are often repeat offenders. *Child Sexual Abuse* at 13.

Restraint and treatment are therefore necessary to prevent a continuing pattern of abusive behavior. *Id.* One of the most effective ways to stop this cycle of violence and abuse is to prosecute child molesters to conviction. This will both stop the convicted abuser from continuing his or her criminal behavior and will deter others from committing such crimes.

However, prosecution of child abuse cases has proven difficult for a variety of reasons. As this Court recently noted, "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim." *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987). Indeed, there is a never-ending list of hurdles to overcome in successfully prosecuting child abuse cases, including: (i) the young victim is often incapable of testifying under oath (*see, e.g., Kentucky v. Stincer*, 482 U.S. 730, 732 n.1 [1987] [noting that Stincer was originally charged with committing one count of first-degree sodomy (Ky. Rev. Stat. § 510.070 [1985]) against five-year-old B.H. but the prosecutor was compelled to dismiss this count because it did not believe B.H. was competent to testify]); (ii) the child's parents are often reluctant, if not steadfastly opposed, to having their child relive the trauma of the crime by testifying (*see* Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 New Eng. L. Rev. 643, 647-56 [1982]); (iii) there is often no conclusive, if any, medical evidence to corroborate the alleged abuse (*see* Jones & McGraw, *Reliable and Fictitious Accounts of Sexual Abuse to Children*, 2 J. Interpersonal Violence 27, 35 [March 1987] [estimating that there is no medical or physical evidence in more

than 80% of child sexual abuse cases]); (iv) the child's disclosure of the abuse is often belated, due to deadly threats by the abuser or the child's belief that the child has done something wrong, and as a result, the child's memory of the crime at the time of disclosure may not be as precise as it was closer in time to the crime (*see* DeFrancis *Protecting the Child Victim of Sex Crimes Committed by Adults, Final Report* 64, 217-18 [1969] [*noted in* S. Katz and M. Mazur, *Understanding the Rape Victim* at 190 (1979)]); and, (v) even if there are any eyewitnesses to the abuse, they may be unwilling to testify against the abuser who is often a member of the witness's family or a close friend. *See* Conte and Berliner, *Sexual Abuse of Children: Implications for Practice*, J. Contemp. Soc. Work 601, 603 (1981). In brief, because there are inherent difficulties in prosecuting these horrible crimes, most child abusers unfortunately remain free to continue committing the same or similar crimes. *See* Whitcomb, Shapiro and Stellwagen, *When the Victim is a Child*, United States Department of Justice, National Institute of Justice, p. i (Washington, D.C.: Government Printing Office, 1985) (estimating that more than 90% of all child abuse cases do not go forward) (*cited and referred to in* The Office of Justice Systems Analysis, New York State Division of Criminal Justice Services, *The Investigation and Prosecution of Crimes Against Children in New York State* at 191 [1988]).

Against this dismal backdrop, it hardly can be disputed that the protection of child abuse victims is a compelling state interest. Protection of a youthful victim of sexual abuse by allowing the child to testify outside of the physical presence of the alleged abuser, who has often assumed a role of superiority in the child's life, will undoubtedly alleviate some of the difficulties in the prosecution of these cases. *See, e.g., People v. Algarin*, 129 Misc. 2d 1016, 498 N.Y.S.2d 977 (Sup. Ct. Bx. Co. 1986) (child victims, aged 4-6, attended day care center where defendant worked); *Glendening v. State*, 536 So.2d 212 (Fla. 1989) (13 1/2-year-old child sexually abused by father); *Brady v. State*, 540 N.E.2d 59 (Ind. App. 3d Dist. 1989) (4-year-old child sexually abused by father). First, it will minimize the potential trauma to the

child witnesses arising from the requirement of testifying in close physical proximity to their attackers, who have often threatened them or their families with death or injury if they reveal the abuse. Second, it will encourage reports of such abuse, which might otherwise go unreported because child victims and their parents will not fear "a second victimization" as a result of the testimony. Third, where a child is incapable of testifying against his or her abuser in the abuser's presence, the child now will be able to provide the evidence necessary to try the abuser and thereby save the case from dismissal. Hence, there is a compelling state interest in the protection of these unfortunate child victims and in the successful prosecution of their abusers. *See Coy v. Iowa*, 108 S. Ct. at 2805 (O'Connor, J., concurring) ("our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses"). *See generally Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982) (recognizing the government's "compelling" interest in "safeguarding the physical and psychological well-being of a minor [victim]" and allowing "the trial court to determine on a case-by-case basis whether the State's legitimate concern for the well-being of the minor victim necessitates [courtroom] closure").

C. A case-specific finding either that the child cannot communicate in the defendant's presence or that the child will suffer severe mental or emotional harm were the child to testify in the defendant's presence is sufficient to establish the need to use closed-circuit television.

This Court, in *Ohio v. Roberts*, 448 U.S. at 65-66, set forth a two-part test for determining when the right to confrontation will yield to permit the admission of hearsay statements to further an important state interest. First, there must be a necessity for an exception in a particular case. *Id.* at 65. Second, the evidence sought to be admitted under the exception must bear adequate indicia of reliability. *Id.* at 65-66. The testimony of a child, which is simultaneously transmitted to the jury for its immediate scrutiny, bears as much, if not

greater, indicia of reliability than out-of-court hearsay statements whose reliability can be tested only by after-the-fact examination. Consequently, the Court should not impose a more stringent test than that of *Ohio v. Roberts* to determine the admissibility of any form of closed-circuit television in a particular case of child abuse.

While a generalized, presumed, legislative finding of necessity is insufficient to satisfy the necessity prong permitting an exception to the Confrontation Clause, a case-specific finding of necessity is sufficient. *Coy v. Iowa*, 108 S. Ct. at 2803; *Id.* at 2803-05 (O'Connor, J., concurring). In allowing a child victim of sexual abuse to testify via closed-circuit television, there are two specific needs that can satisfy this requirement, either of which is sufficient. One need relates to the child, and the other to the child's testimony. First, as was shown in *Craig v. Maryland*, the necessity requirement can be established by a showing that the child will suffer "serious emotional distress such that the child cannot reasonably communicate." *Craig v. Maryland*, 316 Md. 551, ____, 560 A.2d 1120, 1121 (1989); Md. Cts. & Jud. Proc. Code Ann. § 9-102(a)(1)(ii) (1989 Repl. Vol.). In this situation, the need is to obtain the child's obviously relevant testimony.

Second, the necessity requirement may be satisfied by a showing that as a result of giving trial testimony without the use of closed-circuit television the "child witness will suffer severe mental or emotional harm." N.Y. Crim. Proc. Law § 65.10(1) (McKinney Supp. 1990). In this situation, the need is to protect the child from suffering serious psychological injury, additional to the injury the child has already suffered as a victim of abuse.

Indeed, the Maryland court in *Craig* did not dispute that either of these two needs could, in a particular case, be sufficient to allow child sexual abuse victims to testify via closed-circuit television. *Craig v. Maryland*, 560 A.2d at 1127. Rather, the court ruled that while either need may be sufficient, the prosecution must establish that the need would arise from the child witness testifying in the defendant's presence, and that the need would not result merely from the child witness testifying in open court. *Id.*

Moreover, there is good reason for allowing an adequate showing of either of these two needs to warrant the admission of testimony that does not comply strictly with the Confrontation Clause. A showing of necessity based on the child's inability to communicate is sufficient because such a showing would establish the functional equivalent of the child's unavailability. Surely if a child witness is unable to speak about the crime in the defendant's presence, the child is unavailable to testify in open court as a witness for the prosecution. Thus, an adequate showing of the child's inability to communicate, which renders the child unavailable, is sufficient to warrant allowing the child to testify via closed-circuit television. *See Ohio v. Roberts*, 448 U.S. at 65 (in the usual case, the necessity requirement alleviating the need for strict compliance with the Confrontation Clause is established when the prosecution demonstrates the physical unavailability of the declarant whose statement it wishes to use against the defendant); *Nelson v. Farrey*, 874 F.2d at 1231, 1233 (concurring opinion) (three-year-old victim of sexual abuse unavailable to testify where child "could not provide meaningful testimony about the alleged assault," even though child "was readily identified and located and could have easily been transported to trial").

Similarly, a showing that a child witness would suffer severe mental or emotional harm were the child forced to testify in open-court in the defendant's presence, and that the extent of this harm would likely be decreased if the child were permitted to testify via closed-circuit television, is a sufficient need for allowing the child to testify via closed-circuit television. In such a case, the state prosecutor should not be placed in the intolerable position of having to choose between inflicting psychological harm on the child or abandoning a warranted criminal prosecution against a child molester. Thus, in this situation too the child is functionally equivalent to an unavailable witness. *Cf. Burns v. Clusen*, 798 F.2d 931 (7th Cir. 1986) (sexual assault victim was "unavailable" to testify at defendant's trial, where she had been admitted to psychiatric ward suffering from psychological illness, and, if forced to confront defendant, would suffer a substantial

relapse of mental illness); *Warren v. United States*, 436 A.2d 821, 828-29 (D.C. App. 1981) (rape victim "unavailable" to testify where two psychiatrists concluded that if victim were forced to testify victim would suffer severe psychological injury); *People v. Lombardi*, 39 A.D.2d 700, 701 (1st Dep't 1972), *aff'd*, 33 N.Y.2d 658 (1973), *cert. denied*, 416 U.S. 906 (1974) (rape victim "unavailable" to testify at defendant's trial where her husband and her psychiatrist testified that if she were required to appear and testify in person, her mental and physical health would have been seriously jeopardized).[6]

Furthermore, the state has a special obligation to prevent a child witness from suffering harm because the state, in exercising its *parens patriae* role, has a special duty to protect children. *See, e.g., In re Gault*, 387 U.S. 1, 14-18 (1967). The state has a unique obligation to its children and, when there are reasonable steps that the state can take to protect its child victims from suffering further trauma that do not impair a defendant's rights in any substantial way, the state should have the power to do so. Indeed, it is the state's duty, through its legislative and judicial powers, to care for the welfare of all its children, particularly when parents do not, as is often the case for child victims of sexual abuse. *See* Libai, *Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 Wayne L. Rev. 977, 985 (1969); Note, *The Young Victim as Witness for the Prosecution: Another Form of Abuse?*, 89 Dick L. Rev. 721, 785 (1985).

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6 *Also cf., United States v. Lansky*, 496 F.2d 1063 (5th Cir. 1974) (conviction for criminal contempt for failing to respond to subpoena to appear before grand jury reversed where physician had advised defendant, due to his poor health, not to travel and to avoid any physical and emotional stress); *United States v. Thompson*, 319 F.2d 665 (2d Cir. 1963) (dismissing contempt proceedings against defendant for failing to comply with grand jury subpoena because defendant actually believed that compliance with subpoena would create a risk of harm to his health, regardless of whether defendant's health was actually at risk).

D. The reliability of testimony obtained via closed-circuit television can be tested in the same manner and to the same extent as can the reliability of testimony given in open court.

The second part of the *Roberts* test is whether the evidence sought to be admitted bears adequate indicia of reliability despite the lack of face-to-face confrontation. *Ohio v. Roberts*, 448 U.S. at 65-66. A child's testimony via closed-circuit television satisfies this requirement because it has "particularized guarantees of trustworthiness." *Id.* at 66. Indeed, the reliability of such testimony may be tested in the same way as traditional in-court testimony: it is subject to cross-examination, and the fact-finder has an opportunity to observe and assess the demeanor and credibility of the child witness under both direct and cross-examinations.

In some cases, the admission of hearsay statements was deemed proper because the statements themselves were inherently reliable. *See, e.g., United States v. Bourjaily*, 483 U.S. 171, 181-84 (1987) (co-conspirator statements); *Lee v. Illinois*, 476 U.S. 530, 551 n. 4 (1986) (statements against penal interest) (Blackmun, J., dissenting, recognizing generally that "most jurisdictions now allow the introduction, in appropriate circumstances, of out-of-court declarations against penal interest"); *Kirby v. United States*, 174 U.S. 47, 61 (1899) (dying declarations); *United States v. Napier*, 518 F.2d 316 (9th Cir.), *cert. denied*, 423 U.S. 895 (1975) (excited utterances). In other cases, including those concerning the propriety of the admission of hearsay statements in the form of prior testimony, this Court has found that the reliability requirement had been satisfied because the defendants and their counsel had an opportunity to cross-examine the declarants of the hearsay statements and the triers of fact, thus, had been afforded satisfactory bases for evaluating the truth of the prior statements. *See Ohio v. Roberts*, 448 U.S. 71; *California v. Green*, 399 U.S. 149 (1970). In those cases, the mere fact that the witnesses had been cross-examined, even though not in front of the jury, rendered the statements sufficiently reliable to permit their introduction where there was

a distinct need for the statements. *See also United States v. Owens*, 484 U.S. 554 (1988) (defendant's right to confrontation satisfied where witness testified to prior out-of-court identification even though, due to memory loss, witness could not explain the basis for the identification, because defendant given opportunity to cross-examine witness); *Delaware v. Fensterer*, 474 U.S. 15 (1985) (per curiam) (defendant's right to confrontation satisfied where expert witness testified as to what opinion he had formed, but could not recollect the basis on which he had formed it, because defendant given opportunity to cross-examine witness).

Similarly, when the prosecution seeks to procure the needed testimony of a child via closed-circuit television, the testimony should be admissible because in that situation defense counsel will have a full opportunity to cross-examine the witness. Such cross-examination will allow counsel to challenge whether the child is sincerely telling what the child believes to be the truth, whether the child accurately perceived and remembers the matter the child is relating, and whether the child's intended meaning is adequately conveyed by the language the child employs. *See Ohio v. Roberts*, 448 U.S. at 70-71 (referring to these three goals as the objectives of cross-examination, and finding that, when a defense attorney has the opportunity to satisfy these objectives by his questioning of a witness, the admission of prior statements does not violate the Confrontation Clause) (citing Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 Harv. L. Rev. 1378 [1972]). In addition, the likelihood that unreliable testimony will come before the jury is the same whether the testimony presented to the jury is obtained via closed-circuit television or traditional in-court means, because the child's testimony is live and spontaneous and the child's responses and physical reactions are visible to the jury exactly as they would be if the child were seated on the stand in the courtroom. *See People v. Cintron*, slip op. at 13-14, n.6 (reminding trial courts to be "exacting in their application of all of the statutory limitations and protections [N.Y. Crim. Proc. Law § 65.30 (1)], including those which require that the tele-

vision technology used provide all the trial participants with an adequate opportunity to evaluate the witness's testimony").

Moreover, the statements of a child witness during a trial bear even more assurances of reliability than prior, out-of-court hearsay statements. When a child's testimony is transmitted to the jury via closed-circuit television, the fact-finder is able to observe an accurate image of the child witness as the child is testifying. Thus, the fact-finder is able to evaluate the credibility of the child witness because it is watching the child as he or she makes the statements being considered for their truthfulness, unlike a case involving the admission of a typical hearsay statement where the declarant's demeanor at the time of the out-of-court statement cannot be assessed by the fact-finder in assessing the declarant's credibility. *See, e.g., United States v. Owens*, 484 U.S. at 560 ("when a hearsay declarant is present at trial and subject to unrestricted cross-examination," not necessary for proponent of the evidence to establish particular guarantees of trustworthiness before seeking its admission). Clearly, then, a fact-finder will have an even better opportunity to evaluate the testimony obtained via closed-circuit television than does a fact-finder who has to evaluate former testimony that is admitted into evidence as a hearsay exception. Thus, a child's testimony via closed-circuit television is as reliable as testimony given by a witness who is physically present in the courtroom. Such testimony should, therefore, be admissible.

E. The Confrontation Clause does not dictate the exclusive manner by which a state court may make a case-specific finding of necessity, and in no circumstances does it require the child to testify in the defendant's presence before testimony via closed-circuit television may be admitted into evidence.

The manner in which a prosecutor can demonstrate the need for evidence sought to be admitted under an exception to the Confrontation Clause is a matter best left to the sound discretion of the trial court, in applying the law of the state

in which the court sits. The Confrontation Clause does not require the means by which the proponent must meet its burden, but rather specifies merely what the burden is. Thus, it is up to the individual state, in applying its own rules of evidence, to determine how that burden is to be met.

That the Constitution does not specify the precise manner in which the need for an exception to the Confrontation Clause may be met is consistent with this Court's interpretations of other Constitutional provisions. For example, in deciding that the Due Process Clause of the Fourteenth Amendment to the Constitution permits a prosecutor to use a defendant's confession against the defendant only when there has been a reliable determination that the confession was voluntary, this Court did not require that such voluntariness be proved by any particular piece of evidence. *See Jackson v. Denno*, 378 U.S. 368 (1964). *See also People v. Huntley*, 15 N.Y.2d 72 (1965) (deciding the appropriate procedure in New York for providing the hearing mandated in *Jackson v. Denno*). Thus, in establishing the voluntariness of a confession in a particular case, the prosecutor may present the testimony of the detective who took the statement and administered *Miranda* warnings, if such warnings were given, or the prosecutor may present the testimony of any person present during the interrogation. *See, e.g., United States v. Madison*, 689 F.2d 1300, 1308 (7th Cir. 1982), *cert. denied*, 459 U.S. 1117 (1983). Surely the prosecutor is not required to present a particular type of evidence, such as psychiatric testimony related to the voluntariness of a defendant's confession, in every such case. *See also, e.g., Costello v. United States*, 350 U.S. 359, 361-62, *reh'g denied*, 351 U.S. 904 (1956) ("The Fifth Amendment provides that federal prosecutions for capital or otherwise infamous crimes must be instituted by presentments or indictments of grand juries. But neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act."); *Gerstein v. Pugh*, 420 U.S. 103, 123-25 (1975) (Fourth Amendment does not require the precise procedure by which state courts are to determine probable cause

so long as the procedure a state may adopt is fair and results in a reliable determination).

Just as the Constitution does not dictate the exact manner in which other Constitutional standards are met, it does not dictate the exact manner in which the prosecution may meet its burden of establishing the need for a child's testimony via closed-circuit television. Thus, in a particular case, the burden of establishing the necessity for testimony via closed-circuit television may be met by the testimony of one, or any combination, of the following potential witnesses: a child care worker, a teacher, a parent or other family member, the child victim, a psychiatrist, a psychologist, an expert in the areas of child abuse or the child abuse accommodation syndrome, or any other witness competent to assess the likely effect on the child of the child's testifying in the defendant's presence in open court.

Thus, while the child certainly may be able to provide probative evidence of his or her inability to testify in front of the defendant in open court such that strict compliance with the Confrontation Clause is not warranted, the actual testimony of the child is not required by the Confrontation Clause. Rather, the nature of the system used, the law of each state, and the necessities of a particular case will determine whether the prosecution can meet its high burden by the testimony of lay and expert witnesses, or whether the child's testimony will be required due to any unique circumstances of the case. *Compare, e.g., Craig v. Maryland*, 560 A.2d at 1127-29 (testimony of an expert alone is insufficient to establish necessity; in light of the Supreme Court's holding in *Coy v. Iowa*, child must attempt to testify in front of defendant before an alternative procedure may be used); *Rhode Island v. Taylor*, ____ R.I. ____, 562 A.2d 445 (1989) (Confrontation Clause of Rhode Island Constitution requires that an attempt must be made to have the child testify in defendant's presence and, if that is unsuccessful, then expert testimony must be provided); *and, People v. Cintron*, No. 241, slip op. at 18-22 (N.Y. Ct.App. January 11, 1990) (court's observation of a child witness cannot alone justify the use of even a two-way closed-circuit television as an alternative to the traditional means of introducing testimony) *with State v. Bonello*, 210 Conn. 51, *cert. denied*, 109 S. Ct. 2103, *reh'g denied*, 109 S. Ct. 3268 (1989) (expert testimony that the reliability and trustworthiness of a child victim's testimony would be undermined by forcing the child to testify in defendant's physical presence was sufficient to establish the need for videotaped testimony outside the presence of defendant); *and State v. Crandall*, 231 N.J. Super. 124, 132, 555 A.2d 35, 39 (1989) ("expert testimony *may* be warranted when defendant challenges utilization of the statutory procedure" whereby a child abuse victim will testify via closed-circuit television) (emphasis added).

Indeed, a rule requiring in every case that the child victim testify at a pretrial hearing in the defendant's presence is illogical to the point of cruelty. Were this the rule, the prosecution's successful showing that the use of closed-circuit television is needed would in many cases be a purely Pyrrhic victory. This would result, for instance, when the child witness would "suffer severe mental or emotional harm" if required to testify in open court in the defendant's presence (N.Y. Crim. Proc. Law § 65.10 [1] [McKinney Supp. 1990]). In this circumstance, it would be inhumane to require the child to testify at a pretrial hearing in the defendant's presence and thereby suffer the very harm the statute authorizing testimony via closed-circuit television seeks to prevent, for in such a case the prosecution's victory will have been won at a staggering cost.[7]

The Court of Appeals of Maryland, however, decided that the Confrontation Clause establishes a *per se* rule that, before a child witness may be permitted to testify via closed-circuit television, the child must attempt to testify in front of the defendant at a pretrial hearing. In its decision, the court stated that the Sixth Amendment, as well as Article 21 of the State Constitution, requires that Maryland's closed-circuit television statute (Md. Cts. & Jud. Proc. Code Ann.

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7 For this very reason, the New York closed-circuit television statute requires that a child not be compelled to testify in the defendant's presence at the pretrial hearing. N.Y. Crim. Proc. Law § 65.20 (6).

§ 9-102[a][1][ii]) cannot be invoked in the face of a confrontation challenge unless the child initially is questioned and is found by the court "to be unable to 'reasonably communicate' because of 'serious emotional distress' produced by the presence of the defendant." *Craig v. Maryland*, 560 A.2d at 1127. Because the Confrontation Clause does not require the particular means by which the prosecution must meet its burden of establishing necessity, and certainly does not require that in every case the burden be met by the child's testimony, the Maryland court was wrong. Accordingly, this Court should remand the case to the Maryland court to decide whether the same *per se* rule should apply to Maryland prosecutors as a matter of state law, in light of this Court's ruling that such a rule is not mandated by the Constitution.

CONCLUSION

THE USE OF TWO-WAY CLOSED-CIRCUIT TELEVISION DOES NOT IMPLICATE THE CONFRONTATION CLAUSE. EVEN IF IT DOES, THE CONFRONTATION CLAUSE DOES NOT REQUIRE THAT A CHILD VICTIM OF SEXUAL ABUSE TESTIFY IN THE DEFENDANT'S PRESENCE AND SUFFER HARM BEFORE EITHER TWO-WAY OR ONE-WAY CLOSED-CIRCUIT TELEVISION MAY BE ADMITTED AT A CRIMINAL TRIAL.

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APPENDIX

NEW YORK'S CLOSED-CIRCUIT TELEVISION STATUTE

ARTICLE 65—USE OF CLOSED-CIRCUIT TELEVISION FOR CERTAIN CHILD WITNESSES [NEW]

SECTION

65.00 Definitions.
65.10 Closed-circuit television; general rule; declaration of vulnerability.
65.20 Closed-circuit television; procedure for application and grounds for determination.
65.30 Closed-circuit television; special testimonial procedure.[1]

§ 65.00 Definitions

As used in this article:

1. "Child witness" means a person twelve years old or less who is or will be called to testify in a criminal proceeding, other than a grand jury proceeding, concerning an offense defined in article one hundred thirty of the penal law or section 255.25 of such law which is the subject of such criminal proceeding.

2. "Vulnerable child witness" means a child witness whom a court has declared to be vulnerable.

3. "Testimonial room" means any room, separate and apart from the courtroom, which is furnished comfortably and less formally than a courtroom and from which the testimony of a vulnerable child witness can be transmitted to the courtroom by means of live, two-way closed-circuit television.

4. "Live, two-way closed-circuit television" means a simultaneous transmission, by closed-circuit television, or other electronic means, between the courtroom and the testimonial room in accordance with the provisions of section 65.30.

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1 So in original. Does not conform to section catchline.

5. "Operator" means the individual authorized by the court to operate the closed-circuit television equipment used in accordance with the provisions of this article.

6. A person occupies "a position of authority with respect to a child" when he or she is a parent, guardian or other person responsible for the custody or care of the child as to the relevant time or is any other person who maintains an ongoing personal relationship with such parent, guardian or other person responsible for custody or care, which relationship involves his or her living, or his or her frequent and repeated presence, in the same household or premises as the child.
(Added L. 1985, c. 505 § 1).

§ 65.10 Closed-circuit television; general rule; declaration of vulnerability

1. A child witness shall be declared vulnerable when the court, in accordance with the provisions of section 65.20, determines by clear and convincing evidence that it is likely, as a result of extraordinary circumstances, that such child witness will suffer severe mental or emotional harm if required to testify at a criminal proceeding without the use of live, two-way closed-circuit television and that the use of such live, two-way closed-circuit television will help prevent, or diminish the likelihood or extent of, such harm.

2. When the court declares a child witness to be vulnerable, it shall, except as provided in subdivision four of section 65.30, authorize the taking of the testimony of the vulnerable child witness from the testimonial room by means of live, two-way closed-circuit television. Under no circumstances shall the provisions of this article be construed to authorize a closed-circuit television system by which events in the courtroom are not transmitted to the testimonial room during the testimony of the vulnerable child witness.

3. Nothing herein shall be contrued[1] to preclude the court from exercising its power to close the courtroom or from

1 So in original. Probably should be "construed".

exercising any authority it otherwise may have to protect the well-being of a witness and the rights of the defendant.
(Added L. 1985, c. 505 § 1).

§ 65.20 Closed-circuit television; procedure for application and grounds for determination

1. Prior to the commencement of a criminal proceeding; other than a grand jury proceeding, either party may apply to the court for an order declaring that a child witness is vulnerable.

2. A motion pursuant to subdivision one of this section must be made in writing at least eight days before the commencement of trial or other criminal proceeding upon reasonable notice to the other party and with an opportunity to be heard.

3. The motion papers must state the basis for the motion and must contain sworn allegations of fact which, if true, would support a determination by the court that the child witness is vulnerable. Such allegations may be based upon the personal knowledge of the deponent or upon information and belief, provided that, in the latter event, the sources of such information and the grounds for such belief are stated.

4. The answering papers may admit or deny any of the alleged facts and may, in addition, contain sworn allegations of fact relevant to the motion, including the rights of the defendant, the need to protect the child witness and the integrity of the truth-finding function of the trier of fact.

5. Unless all material facts alleged in support of the motion made pursuant to subdivision one of this section are conceded, the court shall, in addition to examining the papers and hearing oral argument, conduct an appropriate hearing for the purpose of making findings of fact essential to the determination of the motion. Except as provided in subdivision six of this section, it may subpoena or call and examine witnesses, who must either testify under oath or be permitted to give unsworn testimony pursuant to subdivision two of

section 60.20 and must authorize the attorneys for the parties to do the same.

6. Notwithstanding any other provision of law, the child witness who is alleged to be vulnerable may not be compelled to testify at such hearing or to submit to any psychological or psychiatric examination. The failure of the child witness to testify at such hearing shall not be a ground for denying a motion made pursuant to subdivision one of this section. Prior statements made by the child witness relating to any allegations of conduct constituting an offense defined in article one hundred thirty of the penal law or incest as defined in section 255.25 of such law or to any allegation of words or conduct constituting an attempt to prevent, impede or deter the child witness from cooperating in the investigation or prosecution of the offense shall be admissible at such hearing, provided, however, that a declaration that a child witness is vulnerable may not be based solely upon such prior statements.

7. (a) Notwithstanding any of the provisions of article forty-five of the civil practice law and rules, any physician, psychologist, nurse or social worker who has treated a child witness may testify at a hearing conducted pursuant to subdivision five of this section concerning the treatment of such child witness as such treatment relates to the issue presented at the hearing, provided that any otherwise applicable statutory privileges concerning communications between the child witness and such physician, psychologist, nurse or social worker in connection with such treatment shall not be deemed waived by such testimony alone, except to the limited extent of permitting the court alone to examine in camera reports, records or documents, if any, prepared by such physician, psychologist, nurse or social worker. If upon such examination the court determines that such reports, records or documents, or any one or portion thereof, contain information material and relevant to the issue of whether the child witness is a vulnerable child witness, the court shall disclose such information to both the attorney for the defendant and the district attorney.

(b) At any time after a motion has been made pursuant to subdivision one of this section, upon the demand of the other party the moving party must furnish the demanding party with a copy of any and all of such records, reports or other documents in the possession of such other party and must, in addition, supply the court with a copy of all such reports, records or other documents which are the subject of the demand. At any time after a demand has been made pursuant to this paragraph, the moving party may demand that property of the same kind or character in possession of the party that originally made such demand be furnished to the moving party and, if so furnished, be supplied, in addition, to the court.

8. (a) Prior to the commencement of the hearing conducted pursuant to subdivision five of this section, the district attorney shall, subject to a protective order, comply with the provisions of subdivision one of section 240.45 of this chapter as they concern any witness whom the district attorney intends to call at the hearing and the child witness.

(b) Before a defendant calls a witness at such hearing, he or she must, subject to a protective order, comply with the provisions of subdivision two of section 240.45 of this chapter as they concern all the witnesses the defendant intends to call at such hearing.

9. The court may consider, in determining whether there are such extraordinary circumstances as would cause the child witness to suffer severe mental or emotional harm, a finding that any one or more of the following factors have been established by clear and convincing evidence:

(a) The manner of the commission of the offense of which the defendant is accused was particularly heinous or was characterized by aggravating circumstances.

(b) The child witness is particularly young or otherwise particularly subject to psychological harm on account of a physical or mental condition which existed before the alleged commission of the offense.

(c) At the time of the alleged offense, the defendant occupied a position of authority with respect to the child witness.

(d) The offense or offenses charged were part of an ongoing course of conduct committed by the defendant against the child witness over an extended period of time.

(e) A deadly weapon or dangerous instrument was allegedly used during the commission of the crime.

(f) The defendant has inflicted serious physical injury upon the child witness.

(g) A threat, express or implied, of physical violence to the child witness or a third person if the child witness were to report the incident to any person or communicate information to or cooperate with a court, grand jury, prosecutor, police officer or peace officer concerning the incident has been made by or on behalf of the defendant.

(h) A threat, express or implied, of the incarceration of a parent or guardian of the child witness, the removal of the child witness from the family or the dissolution of the family of the child witness if the child witness were to report the incident to any person or communicate information to or cooperate with a court, grand jury, prosecutor, police officer or peace officer concerning the incident has been made by or on behalf of the defendant.

(i) A witness other than the child witness has received a threat of physical violence directed at such witness or to a third person by or on behalf of the defendant.

(j) The defendant, at the time of inquiry, (i) is living in the same household with the child witness, (ii) has ready access to the child witness or (iii) is providing substantial financial support for the child witness.

(k) The child witness has previously been the victim of an offense defined in article one hundred thirty of the penal law or incest as defined in section 255.25 of such law.

(l) According to expert testimony, the child witness would be particularly suceptible[1] to psychological harm if required

1 So in original. Probably should read "susceptible".

to testify in open court or in the physical presence of the defendant.

10. Irrespective of whether a motion was made pursuant to subdivision one of this section, the court, at the request of either party or on its own motion, may declare a child witness to be vulnerable when it determines from its own observations that a child witness who has been called to testify at a criminal proceeding is suffering severe mental or emotional harm and therefore is physically or mentally unable to testify or to continue to testify in open court or in the physical presence of the defendant and that the use of live, two-way closed-circuit television is necessary to enable the child witness to testify.

11. In deciding the motion made pursuant to subdivision one of this section, the court shall make findings of fact which reflect the causal relationship between the existence of any one or more of the factors set forth in subdivision nine of this section or other relevant factors which the court finds are established and the determination that the child witness is vulnerable. If the court is satisfied that the child witness is vulnerable and that, under the facts and circumstances of the particu[1]ar case, the defendant's constitutional rights to an impartial jury or of confrontation will not be impaired, it may enter an order granting the application for the use of live, two-way closed-circuit television.

12. When the court has determined that a child witness is a vulnerable child witness, it shall make a specific finding as to whether placing the defendant and the child witness in the same room during the testimony of the child witness will contribute to the likelihood that the child witness will suffer severe mental or emotional harm. If the court finds that placing the defendant and the child witness in the same room during the testimony of the child witness will contribute to the likelihood that the child witness will suffer severe mental or emotional harm, the order entered pursuant to subdivision eleven of this section shall direct that the defendant remain in

the courtroom during the testimony of the vulnerable child witness.
(Added L. 1985, c. 505 § 1.)

§ 65.30 Closed-circuit television; special testimonial procedures

1. When the court has entered an order pursuant to section 65.20, the testimony of the vulnerable child witness shall be taken in the testimonial room and the image and voice of the vulnerable child witness, as well as the image of all other persons other than the operator present in the testimonial room, shall be transmitted live by means of closed-circuit television to the courtroom. The courtroom shall be equipped with monitors sufficient to permit the judge, jury, defendant and attorneys to observe the demeanor of the vulnerable child witness during his or her testimony. Unless the courtroom has been closed pursuant to court order, the public shall also be permitted to hear the testimony and view the image of the vulnerable child witness.

2. In all instances, the image of the jury shall be simultaneously transmitted to the vulnerable child witness in the testimonial room. If the court order issued pursuant to section 65.20 specifies that the vulnerable child witness shall testify outside the physical presence of the defendant, the image of the defendant and the image and voice of the person examining the vulnerable child witness shall also be simultaneously transmitted to the vulnerable child witness in the testimonial room.

3. The operator shall place herself or himself and the closed-circuit television equipment in a position that permits the entire testimony of the vulnerable child witness to be transmitted to the courtroom but limits the ability of the vulnerable child witness to see or hear the operator or the equipment.

4. Notwithstanding any provision of this article, if the court in a particular case involving a vulnerable child witness determines that there is no live, two-way closed-circuit television

equipment available in the court or another court in the county or which can be transported to the court from another county or that such equipment, if available, is technologically inadequate to protect the constitutional rights of the defendant, it shall not permit the use of the closed-circuit television procedures authorized by this article.

5. If the order of the court entered pursuant to section 65.20 requires that the defendant remain in the courtroom, the attorney for the defendant and the district attorney shall also remain in the courtroom unless the court is satisfied that their presence in the testimonial room will not impede full and private communication between the defendant and his or her attorney and will not encourage the jury to draw an inference adverse to the interest of the defendant.

6. Upon request of the defendant, the court shall instruct the jury that they are to draw no inference from the use of live, two-way closed-circuit television in the examination of the vulnerable child witness.

7. The vulnerable child witness shall testify under oath except as specified in subdivision two of section 60.20. The examination and cross-examination of the vulnerable child witness shall, in all other respects, be conducted in the same manner as if the vulnerable child witness had testified in the courtroom.

8. When the testimony of the vulnerable child witness is transmitted from the testimonial room into the courtroom, the court stenographer shall record the textimony[1] in the same manner as if the vulnerable child witness had testified in the courtroom.
(Added L. 1985, c. 505, § 1.)

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1 So in original. Probably should be "testimony".